71-682

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

LARRY LEE RANES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Citations	ii
Jurisdiction	1
Questions Presented	2
Statement of the Case	2-7
Argument	7-15
Conclusion	15

CITATIONS

	Page
Escobedo v. Illinois, 378 U.S. 478; 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964)	6, 12
Ex parte Sullivan, D.C., 107 F.Supp. 514, 518 (1952)	9
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)	10
In re Groban, 352 U.S. 330, 334, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376 (1957)	10
Jett v. O'Hara, 366 Mich. 281, 114 N.W. 2d 504 (1962)	11
M.S.A. Sec. 28.967; C.L. (1948) Sec. 767.27	11
Rogers v. United States, 325 F.2d 485 (1963)	10, 15
The Simulation of Sanity, B. L. Diamond, M.D., The Journal of Social Therapy, 3rd Quarter, 1956, Vol. 2, No. 3 (1956)	8
United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968)	13, 14

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JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition but denies that the Michigan Supreme Court has in part decided a federal question contrary to the applicable decision of this Court.

QUESTIONS PRESENTED

The Peitioner fails to mention the precise basis for appeal presented to all Courts — that respondent's request for a lawyer was specifically denied — and so, respondent says the Question presented to this court is well stated by the Michigan Supreme Court:

> "Did the admission of testimony by psychiatrists, based on their examination of defendant *after he had requested but before he had received legal counsel* violate his constitutional rights and constitute prejudicial error?" (Emphasis supplied).

STATEMENT OF THE CASE

"I think maybe I had better have a lawyer." So spoke Larry Lee Ranes sometime before a psychiatric examination scheduled for 8:00 a.m., June 5, 1964. "That will have to wait until there is a magistrate available," replied the assistant prosecutor. But Municipal Judge Olmsted *was* available from shortly after 2:00 a.m., when awakened by the Kalamazoo Police Chief, until 8:00 a.m.

The assistant prosecutor could not recall warning Larry that the psychiatric examination could be used against him at trial. There followed a briefing session between the prosecutor and his psychiatric witnesses from the Kalamazoo State Hospital. And so, a two hour examination was duly had as scheduled, heedless of Larry's request for, and constitutional right to, the assistance of counsel.

This was no first meeting between Larry Lee Ranes and the prosecutor's witnesses, Dr. Clarence M. Schrier, Medical Superintendent, and Dr. William Decker, Clinical Director of the Kalamazoo State Hospital. Larry had been admitted to the Hospital on December 24, 1963, following a suicide attempt. While there, Larry informed Dr. Decker of his army experiences. Dr. Decker writes, "while in the service, the taunts of barrack companions and the theft

of a five-cent bag of potato chips were sufficient reasons to justify an attempt with butcher knives to remove the causal irritant, if necessary, by murder".

Kalamazoo State Hospital discharged Larry Lee Ranes on January 6, 1964 with a diagnosis of "sociopathic personality disturbance, anti-social reaction". Dr. Decker admitted this is a diagnosis of mental disorder. Dr. Schrier says that a sociopath is more dangerous than an overt psychotic. He now has another boy, George Bucher, whom he has termed to be "another Larry Ranes," and must be restrained. Dr. Schrier has ways of keeping a dangerous person if he chooses.

But Larry Lee Ranes was let go and Dr. Schrier is awakened by the assistant prosecutor five months later, at 4:30 a.m., June 5, 1964. Dr. Schrier agreed to see if the man who confessed to killing Mr. Smock was sane or insane, and asked that he be brought to his office. Dr. Schrier says, "I got back in bed and suddenly it hit me as to what had happened, and I called back and stated that I would be down to the jail to visit him at 8:00 o'clock". The assistant prosecutor did not know that Dr. Schrier was also going to bring Dr. Decker, Dr. Schrier also felt that it would be a good idea to have a physician called to give Larry a medical examination.

Within those five months away from the State Hospital, Larry Lee Ranes had become 19 years of age on March 20, 1964 and had killed five men. The fourth killing was Gary Smock during the evening of May 29, 1964 and the one for which he was tried. Leaving the body in Mr. Smock's trunk, Larry bought something to eat and a "coke" to wash some of the blood off Smock's car. From there, he drove to Elkhart and slept in the car with the body still in the trunk. After awakening, he killed the fifth man, returned to Kalamazoo, and abandoned the Smock car only when it stalled.

During the evening of June 4, 1964, Larry Lee Ranes informed several people that he was the one who had killed Gary Smock. One person called the authorities. As Larry left the group just before midnight to see a priest and then turn himself in, he was peacefully taken into custody by the Kalamazoo Police.

Larry had Mr. Smock's keys in his pocket and was wearing Mr. Smock's shoes, although they were a little big for him. His expression changed when he learned that Michigan did not have the death penalty and said that he wished he was in Indiana, or could go back to Indiana. Otherwise, his facial expressions didn't change and he spoke in a normal tone of voice as he discussed the several killings. One of the officers was amazed that this boy could do this and talk about it.

The Kalamazoo City Police, the Kalamazoo County Sheriff Department, the Michigan State Police, and the Kalamazoo County Prosecutor's office all continued the interrogation of Larry until arraignment between 3:00 and 4:00 a.m.

Judge Olmsted recalled that he carefully explained the meaning of a preliminary examination and inquired whether Larry understood. He testified, "I don't now recall exactly what his response was, but in looking at him and realizing he was a young person, and wondering whether I, in my own function ought to go ahead any further in the way of explanation, I said, 'Have you been in court before?' thinking if he had been in court before, he might understand these procedures. And he looked at me a minute and then he — the countenance of his face — he broke into — I can best describe it as being somewhat more than a smile and not quite a laugh — and he said, 'Yes, I have been here many times in front of you'." Judge Olmsted thought this was bizarre.

With the seemingly legal requirements achieved through arraignment, the assistant prosecutor then proceeded to obtain a formal stenographic confession between 4:00 and 4:30 a.m. At 4:30 a.m., the assistant prosecutor awakened Dr. Schrier. It is routine with the prosecutor's office to get a psychiatric examination "at any time . . . whenever one may be gotten." The second psychiatrist, Dr. Decker, was Dr. Schrier's idea. Ten to fifteen minutes later, the police from Elkhart, Indiana questioned Larry regarding photographs. Members of all Michigan law enforcement agencies took Larry with them to search his apartment. Thereafter, they removed all his clothes, except for shorts, and put him in a jail cell until the psy-

chiatrists came. Officer Doster was told to sit with Larry between 6:00 and 7:00 a.m., without any explanation as to the necessity of doing so. Still talking, Larry said that he had shot Gary Smock because he couldn't be trusted.

It was likely in this jail cell, without clothes, and between 7:00 and 8:00 a.m. that Larry Lee Ranes asked for a lawyer. The psychiatric examination took two hours, beginning at 8:00 a.m. Nothing seems to have occurred between 10:00 and 11:00 a.m., when Dr. Robert H. Hume arrived to give Larry a physical examination. The doctor found no cuts, abrasions or bruises, indicating where excessive pressure might have been applied to the boy's body. There being nothing more to obtain from Larry, he was now returned to Judge Olmsted to initiate the proceedings for appointment of a lawyer.

Defendant filed a Notice of Insanity. At trial, Kyle E. Haselden was offered as a witness for the defense. He had been a Probation Officer with the Kalamazoo County Juvenile Court since January 1, 1962 soon becoming acquainted with Larry Lee Ranes. He worked with Larry for upwards of one month, and it was his opinion that Larry Lee Ranes did not, or was not able to distinguish right from wrong.

Dr. Donald Carek was also offered as a defense witness. He is a practicing psychiatrist, an instructor on psychiatry at the University of Michigan Medical School, and consultant to the Washtenaw County Juvenile Court. Dr. Carek examined Larry Lee Ranes for about two and one-half hours on June 25, 1964, arriving at a working diagnosis that Larry showed evidence of a mental illness.

The boy was again examined by Dr. Carek for two hours on July 16, 1964. As a result of both examinations, Dr. Carek's diagnosis of Larry Lee Ranes was that he was suffering from a mental illness on May 29, 1964. Based upon a reasonable medical certainty, it was Dr. Carek's opinion that on said date, Larry Lee Ranes was unable to know right from wrong and that, secondly, he was compelled by an irresistible impulse to commit the alleged shooting. In fact, Dr. Carek believed Larry was mentally ill, capable of killing, and unable to distinguish right from

wrong at the time of attempted suicide and confinement to the Kalamazoo State Hospital.

After the defendant rested, an appropriate motion was made to suppress the forthcoming testimony of Doctors Schrier and Decker. The basis of said motion was that these doctors examined Larry Lee Ranes, for the prosecutor, outside the presence of counsel for the defendant after he had asked for a lawyer. It was more incriminating than a confession. This constituted a denial of Ranes' right to due process guaranteed by both the Michigan and United States Constitutions. The trial court denied defendant's motion.

It was Dr. Decker's opinion that Larry Lee Ranes was sane and not compelled by any irresistible impulse on May 20, 1964. Dr. Decker's testimony supplied the motive and requisite mental state for the crime of robbery.

Dr. Schrier felt that in this case there was an unresisted impulse, not an irresistible impulse and the defendant knew the difference of right from wrong when Mr. Snoek was shot. It was his opinion that Larry was sane, and does not suffer from a mental illness or mental deficiency. But, Dr. Schrier also diagnosed Larry as a sociopathic personality disturbance, anti-social reaction. Dr. Schrier remembered having said "And the fact that I said he (Larry Lee Ranes) never learned to distinguish the right from the wrong may be in his own mind, anything he wanted to do was all right, which goes along with a statement of what I want to do and when I want to do it, I will do it".

Conviction of Murder in the First Degree and Murder in the Perpetration of an Armed Robbery followed.

The majority decision and opinion of the Court of Appeals affirmed, not believing this case was controlled by *Escobedo v. Illinois* (1964), 378 U.S. 478. The Dissenting Decision and Opinion of the Court of Appeals held this case clearly falls within the spirit and framework of Escobedo.

Application for leave to appeal to the Supreme Court was granted.

On July 7, 1971, the Michigan Supreme Court reversed the Court of Appeals, set aside the conviction and remand the case to the trial court for a new trial because

defendant was refused counsel at a critical stage of the proceeding. Application for rehearing was denied.

ARGUMENT

It is not difficult to picture the scene in the Kalamazoo Police Station at 4:30 a.m., June 5, 1964. Throughout the night, experienced authorities very efficiently proceeded to assure an ultimate finding that Larry Lee Ranes killed Gary Smock. Except for Larry's preference to be in Indiana where the penalty is death, he had remained passive and polite but disinterested in the proceedings.

The evidence was beyond dispute. The confession would stand up for Judge Olmsted had been awakened to first arraign Larry. Perhaps it was Sergeant Duncan who recalled to the group how he had been "amazed". Maybe Judge Olmsted commented on Larry's "bizarre" response. Certainly, thoughts of this boy's weird conduct since his attempted suicide and release from Kalamazoo State Hospital, five months before, crept into the minds of those present.

Five senseless killings had been committed. After Mr. Smock's, Larry could eat a sandwich and wash blood off his car with a "coke" from which he drank. He could sleep in Mr. Smock's car with the body still in the trunk.

Beyond comprehension, Larry could kill a fifth person, calmly drive from Indiana to Michigan through a roadblock, and abandon Mr. Smock's body only when his car would go no further. Five days later, Larry was still going about wearing Mr. Smock's oversize shoes and uselessly carrying his car keys.

Of what value will be the evidence and a sound confession in light of all this irrational behavior, perhaps bemused the assistant prosecutor while realizing that guilt and responsibility are not separable. Something must be done to counter the defense of insanity. And it must be done before Larry eventually has counsel.

This now became a job for the "expert", Dr. Clarence M. Seltrier, who is awakened at 4:30 a.m. Sleepily, the

call appeared only as another in a long series of requests for examination and preparation for trial. But then, in his own words Dr. Schrier says, "I got back in bed and suddenly it hit me as to what happened, and I called back and stated that I would be down to the jail to visit him at 8:00 o'clock". Nothing was said about Dr. Schrier bringing another psychiatrist with him but he did feel it would be a good idea to have a physical examination.

What indeed had "hit" Dr. Schrier? He is an honorable man but also is human. Unconscious misgivings regarding his own role in the five killings by his former patient could well have prodded him back up out of bed. It would avoid criticism if Larry were to be found sane now, and on January 6, 1964 before the killings when released from the Kalamazoo State Hospital. It would be easy to accept a "Simulation of Sanity" proffered by a death-seeking boy. The Simulation of Sanity, B.L. Diamond, M.D., The Journal of Social Therapy, 3rd Quarter, 1956, Vol. 2, No. 3.

Meanwhile, Larry Lee Ranes requested and, for all practial purposes, was refused the "right to counsel". This boy was then taken at 8:00 a.m. from his cell to Dr. Schrier. The assistant prosecutor did not ask for Dr. William Decker, but he was there at Dr. Schrier's order. Two prosecution psychiatrists, sharing the unconscious motivation prompted by Larry's fateful release from their hospital, would now outnumber the indigent's sole psychiatrist at trial. No one bothered to inform Larry that what he was about to say could be used against him at trial.

And what Larry did then say was used to decisional advantage despite defendant's timely motion to suppress the fruits of this illegal examination. Example: Going to the ultimate question of responsibility which is inseparable from guilt, the prosecutor asks Dr. Schrier:

> "Q. Do you feel that the Defendant knew the difference of right from wrong at that time?
>
> A. Yes, sir.
>
> Q. Why do you say that Doctor?

A. *He admitted to us that he knew it was wrong.*" (Emphasis supplied).

Another example: This time the prosecutor is questioning Dr. Decker:

"A. Then we said, How do you feel about these things? And *he said* I don't really have any feelings about them. Said do you have any remorse? and *he said* no. Are you sad? No. Do you feel you did wrong? *I don't feel it but I know it.* (Emphasis supplied).

Q. (Mr. Schwendener interrupting): What was that Doctor, *I don't feel it but I know it?* (Emphasis supplied).

A. That's right."

And again:

"A. We asked him whether he felt he was insane and *he said no.*" (Emphasis supplied).

Not yet content even with the psychiatric testimony prepared for trial, Larry's "right to counsel" still went unheeded from 10:00 to 11:00 a.m. awaiting the arrival of Dr. Robert H. Hume. His part in the forthcoming trial would be to show that Larry hadn't been beaten into confession. Question by the prosecutor:

"Q. No cuts, abrasions or bruises indicating where excessive pressure might have been applied to his body?

A. This would be true."

Now the scene at the Kalamazoo Police Station is one of utter tranquility. The job is done, conviction is certain, and Larry's belated "right to counsel" may be honored. As was said in *Ex parte Sullivan*, D.C., 107 F.Supp. 514, 518:

"One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel now. They can't

escape the noose. There is nothing that counsel can do for them at trial.' "

The "right to use counsel at the formal trial" became a very hollow thing as, for all practical purposes, the conviction was already assured by pretrial examination. *In re Groban*, 352 U.S. 330, 334, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376 (Black, J., dissenting).

In 1963 the United States Supreme Court held that the due process clause of the fourteenth amendment of the United States Constitution, U.S. Const. Amend. 14, makes applicable to all the states the guarantee of the sixth amendment of the United States Constitution, U.S. Const. Amend. 6, which provides for defendant's assistance of counsel in criminal prosecution. *Gideon v. Wainwright* (1963), 372, U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

This matter was summarized well in the case of *Rogers v. United States* (10 Cir. 1963) 325 F2d 485:

> "The right to counsel by an indigent accused of crime embraces the *right to representation at all times and during all proceedings where the fundamentals of due process are involved.* He has a right to be cautioned, advised, and served by counsel so that he will not be a victim of his poverty." (Emphasis supplied).

The critical time for Larry Lee Ranes to have had counsel was, if not before, when he asked for a lawyer. He was put off with some remark about waiting until there is a magistrate available. To insure the confession, the police had no difficulty awakening Judge Olmsted at 2:00 a.m. and getting him downtown to arraign the boy. Judge Olmsted testified that *he was available until* 8:00 a.m. when the psychiatric examination began. Larry was also deprived of "due process of law" by not being effectively warned of his absolute constitutional right to remain silent when questioned by Doctors Schrier and Decker.

The abuses to which a procedure is subject if it receives appellate approval, are amply illustrated by the facts in this very case. No one stood by Larry when he faced Doctors Schrier and Decker. No one cautioned him how easily

the words of his mouth, in that least scientific settiing of time, place and motivation, could destroy any real defense of not guilty by reason of insanity.

A real issue in this appeal is whether the constitutional "right to counsel" actually means anything. Or put another way, why bother to appoint counsel if it is all a game. A boy, barely 19 years of age in other circumstances a college freshman, obviously mentally sick, is deprived of the lawyer he requests simply by the expediency of stalling until the lawyer can do nothing for him. Meanwhile, the prosecutor is at liberty to have interested persons such as Doctors Schrier and Decker extract from the boy's mouth enough words to convict himself. Connected with the "right to counsel" is the "privilege against self-incrimination." Appellant can conceive of nothing more incriminating than for a jury to hear the boy verbalize that he is sane as it comes to them in the form of testimony from the Doctors.

For such reasons, an appropriate motion was made to suppress the testimony of Doctors Schrier and Decker. The Trial Court held that if the prosecutor doesn't have the defendant examined immediately after the arrest, the prosecutor may never obtain such examination.

To answer the Trial Court; the prosecution, if he so chooses, may simply file a petition under M.S.A. Sec. 28.967; C.L. (1948) Sec. 767.27. But, countered the Trial Court, suppose the defendant refuses to speak. In *Jett v. O'Hara*, 366 Mich. 281, 114 N.W.2d 504, the Supreme Court was not upset by defense counsel following the Trial Court's suggestion and instructing the respondent to inform the sanity commission of his name and address and to answer no further questions without the advice of counsel. The Supreme Court was concerned with the prosecutor complying with the provisions of the statute.

Furthermore, the sanity statute should not so lightly be dismissed with the legislative safeguards inherent therein. Proceeding by statute rather than by game might enable the "right to counsel" to have substance instead of mere form. Counsel would have an opportunity to make a showing of the relationship between defendant and Doctors

Schrier and Decker. The Trial Court could prudently select disinterested doctors for the psychiatric examination.

And if defendant chose to remain silent, that is his privilege. Constitutional rights cannot be defeated by delay in appointment of counsel. Although it dealt with a confession, *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, applied the same rationale to a somewhat similar set of facts by ruling:

> "(7) We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistence of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, 83 S.Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

Appellant perceives no sound basis for distinguishing an incriminating statement as to the act from an incriminating statement by the suspect verbalizing if he is sane and knows right from wrong. Applying *Escobedo v. Illinois, supra*, to this appeal, it was reversible error to use the statements elicited by Doctors Schrier and Decker against defendant at the criminal trial.

Larry Lee Ranes asked for a lawyer before being submitted to the psychiatric examination. *Escobedo v. Illinois, supra*, says:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."

Deprived of a lawyer who could advise him, Larry cannot be construed as having waived his privilege against self-incrimination. The examination that followed was a compelled violation of the privilege and testimony based thereon should have been excluded. Dr. Schrier came to the Police Station for and at the request of the prosecutor. He brought Dr. Decker. The very nature of their questions was directed towards negativing a defense of responsibility under the M'Naughten Rule, not simply determining mental illness. This line of questioning clearly indicated that the prosecutor intended to use the results of the examination exactly as with the physical examination results. And that is precisely what the prosecutor did to defeat the plea of legal insanity.

Two members of the Michigan Court of Appeals condoned the prosecutor's action in not proceeding by statute and in ignoring defendant's request for counsel. T. G. Kavanagh, Judge, dissented by holding, "This case clearly falls within the spirit and framework of Escobedo . . . The most impressive aspect of the device used here, to me, is the complete lack of justification for it."

In *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968) the defendant was indicted for willful and knowing failure to file federal income tax returns. Prior to trial, at defense counsel's request, the district court, pursuant to 18 U.S.C. § 4244 (1964), appointed a psychiatrist to examine the defendant in order to determine whether he was able to understand the proceedings against him and could properly assist in his own defense. On the basis of this examination, conducted without the presence of counsel, the psychiatrist reported that the defendant was competent to stand trial. At trial, in rebuttal to testimony offered by the defense that Driscoll could not have acted knowingly because he was mentally incompetent, the psychiatrist was permitted to testify that Driscoll was mentally responsible at the time of the criminal acts. This testimony was based upon and included statements made by the accused during the pre-trial court-ordered examination.

In appealing his conviction the defendant maintained that the Supreme Court, acting in its supervisory role, has created a concept of fundamental "fairness" in federal

proceedings, and that the trial court, by allowing the psychiatrist to testify on the issue of mental competency at the time of the criminal act, violated the acceptable boundaries of fairness. The circuit court embraced this contention and reversed, holding that it was unfair to use the psychiatric testimony on the issue of Driscoll's mental responsibility at the time of the crime without providing defendant with adequate notice of this possibility prior to the examination.

The Second Circuit correctly decided that it was unfair to let the psychiatrist testify as to Driscoll's mental condition at the time of the criminal act. Had defendant known of the possibility of such use of the examination, he could have consulted with his attorney prior to the examination. As the court points out, only in this manner could the defendant have responded to the doctor's questioning with adequate understanding of its later significance. Moreover, had the defendant known that the results of the examination would be used at his trial on the issue of mental responsibility, he might have been entitled to certain procedural safeguards, such as the presence of counsel or a psychiatric expert on his behalf during the examination, a transcript or video tape of the examination, and the exercise of his right to remain silent. Furthermore, not realizing that the examination would be so extensively used, defendant might have unwittingly limited his answers, inadvertently providing the psychiatrist with an inaccurate picture of his entire case history. Finally, there is no countervailing reason for not notifying defendant of the possible dual use of the examination. The only effect of a failure to notify the defendant is unfair surprise.

The instant case is much stronger than *Driscoll* where defendant had counsel and the psychiatric examination was held at defense counsel's request. No one here bothered to inform Larry Lee Ranes that what he was about to say to the prosecutor's psychiatrists could be used against him at trial.

As in *Driscoll*, it is fundamentally unfair not to inform defendant that the examining physician will be permitted to testify at trial. Delaying appointment of counsel for

an indigent boy until the prosecutor's case is complete renders meaningless the whole concept of *Rogers v. United States, supra.*

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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